



**CONFERENCIA LATINOAMERICANA
DE COMPAÑIAS EXPRESS
And
AIR COURIER CONFERENCE OF AMERICA**

**VIII AMERICAS BUSINESS FORUM of the FTAA
INVESTMENT
POSITION PAPER**

I. Introduction:

The following comments are submitted on behalf of the Conferencia Latinoamericana de Compañías Express ("CLADEC") and the Air Courier Conference of America ("ACCA") to the Americas Business Forum ("ABF") held in conjunction with the Eighth FTAA Ministerial Meeting in Miami, Florida. These comments address the FTAA Draft Chapter on Investment.

CLADEC is an association of Express Delivery Services ("EDS") providers, that do business in every country of the Americas, and regional and local trade associations representing the Express Delivery Services sector in the Americas. ACCA is the trade association representing the U.S. Express Delivery Services industry. Together, CLADEC and ACCA members have operations in over 200 countries, move more than 20 million packages each day, employ more than 800,000 people, operate 1,200 aircraft and earn revenues in excess of \$50 billion annually.

Express Delivery Services providers transport and deliver on a time-sensitive basis a wide variety of goods, playing an essential role as a facilitator of trade in the Americas. The Express Delivery Services industry has a broad range of interests affected by the FTAA negotiations on Investment, as many FTAA countries maintain governmental measures that impede the provision of Express Delivery Services. This paper provides the recommendations and comments of CLADEC and ACCA regarding the FTAA Draft Chapter on Investment.

The Chapter on Investment requires the inclusion of a precise statement of scope, in conjunction with clear definitions of terms used throughout the Chapter, can

only improve the predictability and clarity of the Chapter.

The Chapter on Investment should include investment protections consistent with the rules provided in the Chapter on Services. This will ensure consistent application of rules between the Chapters on Services and Investment. In this regard, we support the suggestion in footnote 2 that the NGSV and NGIV should coordinate their treatment of this issue, in favor of the consensus reported by the Workshop on Investment.

Article 1.4 should confirm that Parties may prohibit investment in certain economic activities consistent with commitments on commercial establishment undertaken in the Chapter on Services, including national treatment and most-favored nation disciplines. We note that this clarification will in no way call into question the Parties' right to regulate, but rather confirm their obligation to regulate in a fair and non-discriminatory manner.

Articles 1.5 and 1.6 regarding investment related to government functions should confirm that the Chapter on Investment fully applies to such investments. Once again, this confirmation will not prejudge Parties' ability to determine whether to allow investments in certain sectors, as confirmed by Article 1.3, but only require fair and non-discriminatory treatment in sectors open to investment. We suggest that the provisions on government functions concerning investment should be harmonized with parallel provisions in the Chapter on Services, given their similarities of substance.

Article 2: NATIONAL TREATMENT

Article 2.1 should include the following language to confirm that the public or private nature of a service supplier shall not affect their status as like services suppliers or like services for the purposes of national treatment rules: "For the purposes this Article, the likeness of services and service suppliers shall be determined according to the nature of the service supplied, and without regard to the public or private nature of service suppliers." This language would ensure, for example, that national postal administrations and their subsidiaries would be considered "like" private sector suppliers when supply Express Delivery Services.

The suggestion in Article 2.3 that prudential measures might be applied differently and favorably to domestic companies in smaller economies does not seem justifiable. Reasons for applying prudential measures (*e.g.*, for the public good, protection of consumers, etc.) to services suppliers legally established in a Party's territory should apply equally regardless of the foreign or domestic nature of the supplier.

Article 4: EXCEPTIONS TO NATIONAL TREATMENT AND MFN

The requirements set out in Article 4.3 to clarify the application of the Annexes should be made mandatory instead of aspirational. Clear rules governing such exceptions are critical to defining rights in the express delivery sector.

Specifically, we suggest the following changes:

[3. Parties shall identify, where appropriate, specialized provisions for specific sectors and determine how the Annexes containing exceptions to the obligations on national treatment and most-favored-nation treatment will be structured....]

Article 7: PERFORMANCE REQUIREMENTS

The Chapter on Investment should include disciplines on performance requirements such as those set out in Article 7. The Quito ABF Workshop on Investment reported this issue as an area of dissent. We disagree with the first two reported positions: “this is not a topic which should be dealt with in this Forum, since it is a subject of discussion in the WTO,” and “States must be free to impose performance requirements on investments originating in other Party States, according to WTO principles.” We strongly emphasize that no rules on performance requirements presently apply to services under the WTO.

The third bracketed version of Article 7.3 should not include provisions that permit Parties to force individual investors to supply specified services as a condition of investment, except as generally required under the Parties’ domestic law (*e.g.*, universal services obligations in the telecommunications sector).

Article 7.7 should include the following language to ensure that agreements between private parties regarding performance requirements are free from state influence:

[7. This article does not preclude the enforcement of any contractual commitment, undertaking or requirement between private parties that is demonstrably free from all forms of government influence].

Article 16: BASIC DEFINITIONS

The definition of Investor and Investment should be harmonized with parallel provisions in the Chapter on Services. For example, we consider that the “substantial business activities” test should be applied uniformly throughout the Chapters on Investment and Services.